

CONFLICT OF INTEREST

In PCR #00-10, we began a review of the conflict of interest rules. We started off with the first part of **Rule 1.7 Conflict of Interest: General Rule**. That dealt with the situation of the lawyer having multiple clients with adverse interests. Today, we will examine the second half of this rule, dealing with interests and responsibilities of the lawyer that are adverse to the client. First, the rule (paragraph (b)).

Rule 1.7 Conflict of Interest: General Rule

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

[My Comment: When dealing with the type of conflict that involves the lawyer's own interests, we need to be aware that there is another set of Rules that also needs to be considered and also complied with. Sometimes these other rules will "trump" Rule 1.7(b) and its comment (or vice versa). See below for further discussion.]

COMMENT:

...
Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. ... Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate [sic!] and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued.

...
The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, a ... desire to take leave or transfer duty stations If the propriety of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation... .

...

... Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client ..., the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of the proximity and degree.

For example, a legal assistance attorney may not represent both parties in a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them [such as] advising a buyer and seller of an auto and preparing a bill of sale for them.

[**My Additional Comment:** What if the conflict is a financial interest of the lawyer (or of the paralegal or legal technician -- remember these rules apply to them also)? Criminal law (18 U.S.C. Sec. 208) prohibits Federal employees from participating personally and substantially in an official matter in which they have a financial interest. The law and its implementing regulations (5 C.F.R. Part 2635, subpart D and F; and 5 C.F.R. Part 2640) imputes financial interests belonging to others (e.g., the employee's spouse) to the employee, defines financial interests, establishes exceptions, *etc.* The law and regulations must be read together with *Rule 1.17*. For example, if the conflict arises from such a financial interest by which Section 208 disqualifies the lawyer from participating, the lawyer may not, **MUST** not participate even if it were permissible under *Rule 1.17* (i.e., the lawyer determines that the representation will not be materially limited, or the client consents. Rather, as a Federal employee, the lawyer may not participate unless he or she has a waiver or exception as provided by the statute or the regulation. Indeed, the lawyer should not even consult with the client unless a waiver or exception is in place!

Conversely, what if the lawyer has this waiver or exception to the Section 208 conflict? Well, the lawyer still may not participate in the representation if the client does not consent.

So, I think that the correct approach is to read *Rule 1.17* and the conflict of interest statutes (18 U.S.C. Sec. 201, 203, 205, 207, 208 and 209) and their implementing regulations together. Where there is overlap, the stricter rule applies.]

Mike Wentink